

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

DENNIS ALBA,

Case No.: 2:19-cv-01365-APG-BNW

Plaintiff

Order

V.

MARK INCH, et al.,

Defendants

Plaintiff Dennis Alba is a pretrial detainee in the custody of the Nevada Southern
ion Center. He has filed an application to proceed *in forma pauperis*. ECF No. 1. He also
ed a motion to file an amended *Bivens* civil rights complaint along with a second amended
civil rights complaint. ECF Nos. 6, 6-1. Based on the information regarding Alba's
al status, I find that he is not able to pay an initial installment payment toward the full
fee under 28 U.S.C. § 1915. The application to proceed *in forma pauperis* is therefore
d. Alba will, however, be required to make monthly payments toward the full \$350.00
fee when he has funds available. I grant Alba's motion to amend the complaint¹ and now
s his second amended civil rights complaint under 28 U.S.C. § 1915A.

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¹ Alba previously filed a first amended complaint. ECF No. 5. An amended complaint replaces an earlier complaint. *See Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989). Therefore, the operative complaint is the second amended complaint. ECF No. 6-1. It is not clear why, but Alba also filed with his motion to amend the complaint a copy of his original complaint, which I previously screened. ECF No. 6-2. I do not construe the copy of the original complaint as an amended complaint.

1 **I. SCREENING STANDARD**

2 Federal courts must conduct a preliminary screening in any case in which a prisoner
 3 seeks redress from a governmental entity or officer or employee of a governmental entity. *See 28*
 4 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any
 5 claims that are frivolous, malicious, fail to state a claim upon which relief may be granted, or
 6 seek monetary relief from a defendant who is immune from such relief. *See 28 U.S.C.*
 7 § 1915A(b)(1), (2). In addition to the screening requirements under § 1915A, the Prison
 8 Litigation Reform Act (PLRA) requires a federal court to dismiss a prisoner's claim if it "fails to
 9 state a claim on which relief may be granted." 28 U.S.C. § 1915(e)(2); *accord* Fed. R. Civ. Proc.
 10 12(b)(6).

11 Under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388
 12 (1971), a plaintiff may sue a federal officer in his or her individual capacity for damages for
 13 violating the plaintiff's constitutional rights. 403 U.S. at 389. "Actions under § 1983 and those
 14 under *Bivens* are identical save for the replacement of a state actor under § 1983 by a federal
 15 actor under *Bivens*." *Van Strum v. Lawn*, 940 F.2d 406, 409 (9th Cir. 1991). To state a claim
 16 under *Bivens*, a plaintiff must allege: (1) that a right secured by the Constitution or laws of the
 17 United States was violated, and (2) that the alleged violation was committed by a federal actor.
 18 *See id.*

19 Dismissal for failure to state a claim is proper only if it is clear that the plaintiff cannot
 20 prove any set of facts in support of the claim that would entitle him or her to relief. *See Morley v.*
 21 *Walker*, 175 F.3d 756, 759 (9th Cir. 1999). In making this determination, the court takes as true
 22 all allegations of material fact stated in the complaint and construes them in the light most
 23 favorable to the plaintiff. *See Warshaw v. Xoma Corp.*, 74 F.3d 955, 957 (9th Cir. 1996). A

1 reviewing court should “begin by identifying pleadings [allegations] that, because they are no
 2 more than mere conclusions, are not entitled to the assumption of truth.” *Ashcroft v. Iqbal*, 556
 3 U.S. 662, 679 (2009). “While legal conclusions can provide the framework of a complaint, they
 4 must be supported with factual allegations.” *Id.* “Determining whether a complaint states a
 5 plausible claim for relief [is] a context-specific task that requires the reviewing court to draw on
 6 its judicial experience and common sense.” *Id.* The plaintiff must provide more than mere labels
 7 and conclusions, and a formulaic recitation of the elements of a cause of action is insufficient.
 8 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Papasan v. Allain*, 478 U.S.
 9 265, 286 (1986).

10 Although allegations of a pro se complainant are held to less stringent standards than
 11 formal pleadings drafted by lawyers, *see Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v.*
 12 *Kerner*, 404 U.S. 519, 520 (1972); *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th
 13 Cir. 1988), all or part of a complaint filed by a prisoner may be dismissed *sua sponte* if the
 14 prisoner’s claims lack an arguable basis either in law or in fact. This includes claims based on
 15 legal conclusions that are untenable (e.g., claims against defendants who are immune from suit
 16 or claims of infringement of a legal interest which clearly does not exist), as well as claims based
 17 on fanciful factual allegations (e.g., fantastic or delusional scenarios). *See Neitzke v. Williams*,
 18 490 U.S. 319, 327-28 (1989); *see also McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991). If
 19 it is clear from the face of the complaint that any deficiencies could not be cured by amendment,
 20 leave to amend is not required. *See Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

21 **II. SCREENING OF SECOND AMENDED COMPLAINT**

22 In the Second Amended Complaint (SAC), Alba sues the Director of the Bureau of
 23 Prisons March Inch, Warden of FCI Petersburg Virginia Eric D. Wilson, Warden of FCI

1 Cumberland, Maryland Timothy Stewart, and Classification and Computation Technician
2 Dannie Bridges. ECF No. 6-1 at 1-3.

3 The SAC alleges the following: In December of 2016, Alba was made aware of his
4 upcoming release date, which was April of 2017. *Id.* at 13. However, upon his arrival at Federal
5 Correctional Institution Hurlong, California, his unit team notified him of a 2019 release date. *Id.*
6 Alba immediately exhausted his prison remedies. *Id.* Following that, he contacted his family and
7 attorney to notify them, and his mother contacted the prosecutor who handled his case. *Id.* Alba
8 then was transferred to CCA Pahrump, Nevada pending transfer to Federal Correctional
9 Institution Petersburg Virginia. *Id.* Alba then again exhausted prison remedies. *Id.* Alba's
10 attorney communicated with Dannie Bridges, a classification and computation technician. *Id.*
11 They argued over a resolution to the situation and were unsuccessful in resolving the problem at
12 that time. *Id.* Alba then was transferred to the Federal Correctional Institution in Cumberland,
13 Maryland, where he began exhausting the grievance procedure for the third time and wrote his
14 sentencing judge, asking for assistance. *Id.* While in the process of grieving, Alba was released
15 from Cumberland, Maryland. *Id.* He had been wrongfully imprisoned for about 5 months at that
16 time. *Id.* Alba sustained an overdose during his wrongful incarceration and was taken to a
17 hospital. *Id.*

18 A major part of Dannie Bridge's job description is being a time computation technician at
19 Grand Prairie, Texas. *Id.* He is responsible for the calculation of time prisoners are to serve and
20 for credit for time served. *Id.* Warden Wilson and Warden Stewart were responsible for
21 overseeing the last step of the prison remedies at their respective prisons and helping to fix time
22 discrepancies. *Id.* As the Director of Prisons, Mark Inch is responsible for overseeing the
23 structure and policies of the "Agency" and therefore is "accountable for his employees

1 professionalism.” *Id.* Alba alleges that his Fifth Amendment right to due process and his Eighth
 2 Amendment right against cruel and unusual punishment were violated.² *Id.*

3 Regardless of whether Alba is seeking damages or injunctive relief, such as release from
 4 detention, he fails to state a colorable claim. As I previously explained,³ to the extent Alba is
 5 seeking release from custody, he must seek that remedy through a habeas petition, not through a
 6 *Bivens* action. Injunctive relief, including release from custody, may not be obtained through a
 7 *Bivens* action, which is limited to claims for damages. *Solida v. McKelvey*, 820 F.3d 1090, 1093
 8 (9th Cir. 2016); *Valdez v. United States*, 651 F. App’x 626, 627 (9th Cir. 2016) (holding that
 9 plaintiff could not obtain release from prison in *Bivens* action but instead had to seek such relief
 10 from a writ of habeas corpus). Thus, to the extent Alba includes a claim seeking release from
 11 custody, that claim is dismissed.

12 To the extent Alba is seeking damages for the alleged miscalculation of his sentence
 13 resulting in prolonged incarceration, his claim is barred by *Heck v. Humphrey*, 512 U.S. 477
 14 (1994). I previously explained to Alba the applicable law concerning *Heck*. ECF No. 3 at 5-6.
 15 In *Heck*, the Supreme Court held that in order to recover damages for an allegedly
 16 unconstitutional conviction or imprisonment, or for other harm caused by actions whose
 17 unlawfulness would render a conviction or sentence invalid, a plaintiff must prove that the
 18 conviction or sentence has been reversed on direct appeal, expunged by executive order, declared
 19 invalid by a state tribunal authorized to make such a determination, or called into question by a
 20 federal court’s issuance of a writ of habeas corpus, 28 U.S.C. § 2254. *Heck*, 512 U.S. at 486-87.
 21 A claim for damages bearing that relationship to a conviction or sentence that has not been

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 23 ² According to the SAC, Alba currently is a pretrial detainee at Nevada Southern Detention
 Center. ECF No. 6-1 at 2, 4.

³ ECF No. 3 at 4-5.

1 invalidated is not cognizable. *Id.* at 487. Thus, when a state prisoner seeks damages in a civil
2 rights action, the district court must consider whether a judgment in favor of the plaintiff would
3 necessarily imply the invalidity of the fact or duration of his confinement; if it would, the
4 complaint must be dismissed unless the plaintiff can demonstrate that the period of confinement
5 already has been invalidated. *Id.*; *Wilkinson v. Dotson*, 544 U.S. 74, 81–82 (2005).

6 *Heck* applies to a *Bivens* action concerning a cause of action for miscalculation of a
7 prisoner’s sentence. *See Erlin v. United States*, 364 F.3d 1127, 1130–31 (9th Cir. 2004)
8 (explaining that, under *Heck*, a cause of action for miscalculation of a prisoner’s release could
9 not accrue until the prisoner won a writ of habeas corpus); *Martin v. Sias*, 88 F.3d 774, 775 (9th
10 Cir. 1996) (order) (“*Heck* applies to *Bivens* actions.”).

11 Here, Alba’s complaint necessarily implies the invalidity of the duration of his
12 confinement, and *Heck* therefore applies. I previously dismissed this action with leave for Alba
13 to amend his complaint to allege facts sufficient to show that a court has invalidated the duration
14 of his confinement. ECF No. 3 at 6. Alba has failed to allege such facts in his amended
15 complaint and his claim is therefore barred. Accordingly, I dismiss this action without prejudice
16 and without leave to amend.

17 **III. CONCLUSION**

18 I HEREBY ORDER that the motion to amend the complaint (**ECF No. 6**) is granted and
19 the operative complaint is the second amended complaint (ECF No. 6-1).

20 I FURTHER ORDER that Alba’s application to proceed *in forma pauperis* (**ECF No. 1**)
21 is GRANTED. Alba is not required to pay an initial installment fee. Nevertheless, the full filing
22 fee is still due under 28 U.S.C. § 1915 as amended by the PLRA. Alba is permitted to maintain
23 this action to conclusion without the necessity of prepayment of fees or costs or the giving of

1 security therefor. This order granting *in forma pauperis* status shall not extend to the issuance or
2 service of subpoenas at government expense.

3 I FURTHER ORDER that, under 28 U.S.C. § 1915 as amended by the PLRA, the Nevada
4 Department of Corrections shall pay to the Clerk of the United States District Court, District of
5 Nevada, 20% of the preceding month's deposits to the account of DENNIS ALBA # 46078048
6 (in months that the account exceeds \$10.00) until the full \$350 filing fee has been paid for this
7 action. The Clerk shall send a copy of this order to the attention of Warden William W. Lothrop,
8 Phoenix Federal Correctional Institution, 37900 North 45th Ave, Phoenix, AZ 85086.

9 I FURTHER ORDER that, even though this action is dismissed, the full filing fee is still
10 due under 28 U.S.C. §1915 as amended by the PLRA.

11 I FURTHER ORDER that **this action is dismissed** without prejudice and without leave
12 to amend.

13 I FURTHER ORDER that any *in forma pauperis* appeal from this order would not be
14 taken "in good faith" under 28 U.S.C. § 1915(a)(3).

15 I FURTHER ORDER the Clerk of the Court to enter judgement accordingly and close
16 this case. No further documents shall be filed in this closed case.

17 Dated: September 16, 2020.


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19 U.S. District Judge

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